# In the United States Circuit Court of Appeals

## For the Ninth Circuit

No. 7887

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,
Appellee and Cross-Appellant.

*Appeal From the District Court of the United States for the Western District of Washington Northern Division*

## Supplemental Brief of Appellant and Cross-Appellee

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## STATEMENT

The index refers to the same point in appellant's opening brief. To summarize the opening statement, (see Brief page 1):

This suit is to recover on a reparation award of Department of Public Works for alleged overcharges on saw logs hauled in 1926 from Darrington to Ev-

erett, 44 miles, at $2.50 per thousand feet. The tariff quotes "rates in cents per thousand feet"; Item 40 prescribes "the minimum load is 6,000 feet board measure for each car used." Rule 50 is as follows:

"Scaling. Except where logs are scaled by carrier, the shipper shall at his own expense make careful scale of the logs and shall furnish to the railway agent a certificate showing *the actual number of feet* of logs on each car. The railway shall have the right to check-scale logs and revise the shipper's scale if found inaccurate."

No other reference to scaling is found in the tariff.

Appellant has used for many years the Scribner Decimal C table. Upon arrival at Everett, the railroad scaler takes the length and diameter of the log inside the bark, *before the cars are unloaded.* The tables give the number of feet. Thus, a log 40 feet in length and 24 inches in diameter contains 1010 feet by the Scribner table. See Ex. A-2. *The Scribner rule and tables make no deduction for defects.*

In 1906 appellant began to use a scaling rule in connection with the Scribner tables. It was reduced to writing in 1910. (Ex. A-1, Tr. 109.)

The deduction for sap rot and hollows is necessary to obtain actual footage because there is no footage in hollows or sap rot, the latter being found only in wind-falls at the surface resting on the ground. (Tr. 108.)

The evidence is undisputed that appellee's logs were scaled by this rule and freight charges paid in 1926, and for many years prior thereto, as well under

Tariff 51, as under more than a score of previous tariffs in identical form. During the entire period from 1906 to 1927, neither appellee, other log shippers, nor Department said that appellant's tariffs were unlawful *because the scaling rule was not published therein.* That contention was first made in this case. Appellee contends that the so-called bureau or commercial method should have been used. This method is in use by the Puget Sound Log Scaling & Grading Bureau. The bureau is an agency of the loggers, of which Mr. Irving was President in 1926, and Mr. Jamison was a trustee. The bureau scalers measure the logs *after they are unloaded* and the identity of each car is lost. *The minimum rule, therefore, could not be observed.* Berger, Tr. 275. The bureau scalers used the Scribner table, but deduct for defects such as conk, pitch rings, etc., all footage which, in their *uncontrolled judgment*, will not cut into merchantable material. Tr. 120, 121. They also deduct for bowed and crooked logs and for cull or wood logs. Their object is not to obtain the *actual board measure by the Scribner table*, but what they *estimate* is the footage of *good material.* Their scale is purely an estimate and varies at least 5%. Tr. 121, 114. They reject entirely cull or wood logs, defined by the bureau as logs which will not cut out one-third of gross contents into merchantable lumber. Tr. 120. These wood logs have substantial value. Some are run through the mill for their good material and others made into fuel wood. Tr. 120.

The excess footage claimed for wood logs is 1,620,890 feet, on which freight charges were collected of $4,044.81. This amount is included in the findings of the Department and judgment of the court. The balance of the overcharge is for other defects such as conk, wind shakes, etc., amounting to 2,222,240 feet, on which the charges were $5,237.82. The sum of the two is $9,282.63, the amount of recovery below. *The total excess scale claimed is only* 5.6% *of the railroad scale.* Tr. 80.

The log shippers' bureau was not created until *1913*, whereas appellant has been carrying logs and collecting charges under its own tariffs and scaling rule since *1906*. The bureau scales only logs sold. The buyers are not obliged to accept its scale, and many of them do not. Neither does the bureau scale the logs carried by appellant for mills producing their own logs; for instance, the St. Paul & Tacoma Lumber Company, one of the largest log producers, cuts its own logs and does its own scaling, Tr. 121, 116. The log shippers, including Jamison, president of the Sauk Company, and Irving, one of it stockholders, have always known that appellant did not use the bureau method. That railroad scalers were not *even competent* to scale by the bureau method is one of the grounds of appellee's complaint. Finding (15), Tr. 83.

The complaint was filed with the Department in May, 1927, for the first time claiming an overcharge because the bureau method of scaling was not used. The Department made findings and an order that ap-

pellee, "be, and it hereby is, notified *to pay to the Department of Public Works* in accordance with Chapter 110, Laws of 1921, (Rem. Comp. Stat. 10436) as reparation all sums in excess of the sum of $179,501.92," etc. And the "parties hereto are directed to ascertain from the records the exact amount of reparation due under this order and to communicate the same to the Department. *Jurisdiction is hereby reserved by the Department to enter a further order, requiring the payment of reparation by respondent to complainant in the sum agreed on by the parties, or, if the parties are unable to agree then in such sum as the Department may find is in fact due;* and to make such other and further orders as are necessary in the premises." Tr. 92. No agreement was reached *and no further order made.*

The findings, Exhibit 1, Tr. 75, contain much extraneous matter, consisting of a discussion of the testimony, statements of contentions of the parties, citations of decisions and statutes, etc., not findings of *fact* made prima facie evidence. The findings were admitted in full over appellant's general and special objections to each irrelevant portion. Tr. 94.

The basis for the Department's order is that Sec. 10350, quoted in the findings, Tr. 87, requires that all rules which effect the charges shall be published in the tariff, and states "that it appears inconceivable that the railway company should fail during all these years in its duty under the law" to publish the rules. It follows with the statement that:

"The railway company has every right under the law to publish its log tariff upon whatever basis it chooses; whether it be upon a weight basis or a footage, using the gross scale or something different from or less than the gross scale. " * * *

"In the absence of any scaling rule in its schedule, and in view of the ambiguity of the term 'board measure' as applied in the schedule, it appears that the Department has but one question to determine."

It states this question to be, whether the logging company is entitled under the applicable schedule to have the logs scaled by the rule used for "their *sale and purchase* in Western Washington." It answers the question by citing decisions of the I. C. Commission to the point that ambiguous tariffs are construed against their author. So construed, it holds shippers entitled to the commercial scale.

*We emphazize that the award is based solely upon the ground that appellant's scaling rule was not published in tariff form. Had the rule been published it would have been binding.*

Appellant reviewed the order in the Superior Court where it was reversed. Appellee appealed. The Supreme Court reversed the Superior Court. It observes that the railroad scaling rule never became a part of Tariff 51, implying that the statute so requires. It followed the Department's rule of construction of ambiguous documents and states:

"Since Tariff No. 51 does not define what is meant by board measure, and since the method of scaling adopted by the scaling bureau is the one recognized commercially, *it cannot be said that the Department acted arbitrarily or capriciously* in the construction which it placed upon the tariff."

The court exercised no independent judgment of its own. The opinion concludes:

"The judgment appealed from is reversed and the cause remanded with directions to the superior court to enter judgment *sustaining the order of the Department of Public Works.*"

The court rendered no final judgment. (See *Campbell River Mills* case). It exercised no *independent judgment of its own* as to the meaning of the tariff; did not discuss the applicable rules of construction; and, in short, did not pass on the questions raised on this appeal.

It is unnecessary to further notice the State Supreme Court's decision because it adds nothing to the statutory effect of the Department's findings as "prima facie evidence of the facts therein stated," as provided by Sec. 10433. *C. M. St. P. & P. R. Co. v. Campbell River Mills*, 53 Fed. (2) 69, (C. C. A. 9th C); *Southern Pacific R. Co. v Van Hoosear*, 72 Fed. (2) 903, (C. C. A. 9th C).

The following is a recapitulation of the points argued in appellant's brief with citation of authorities prepared as directed by the court:

## ARGUMENT

**POINT I — Appellee not entitled to recover under the undisputed evidence.**

This proposition is based on eight separate contentions, which will be summarized in the same order presented in the opening brief.

*The construction of a tariff presents a question of law for the court where, as here, the controlling facts are not in question.* (Brief 122-125.)

(1) **Tariff 51 not ambiguous.** (Brief 125-137.)

The trial court instructed the jury that the tariff is ambiguous. (Assignment 55). If it be not, appellee has no case.

The meaning of board foot and board measure is as free from doubt as "yard," "bushel," "rod," "pound," "acre," and like terms. Appellee's contention is that the terms are ambiguous only because certain loggers in the Puget Sound area use the commercial rule. Such a trade custom among buyers and sellers of logs is not binding on those not engaged in that trade:

*Great Western Elevator Co. v. White*, 118 Fed. 406.

(2) **Assuming Tariff 51 ambiguous, undisputed evidence that appellee's interpretation gives tariff unreasonable construction and fails to give effect to all its provisions, requires rejection of that interpretation.** (Brief 137-146.)

This rule for the interpretation of ambiguous tariffs has been frequently recognized:

*Great Northern Ry. Co. v. Delmar*, 283 U. S. 686; *Andrew Murphy v. Ann Arbor Co.*, 147 I. C. C. 449; *General Motors v. G. T. W. Ry. Co.*, 118 I. C. C. 99, 104.

Item 50 calls for "the *actual* number of feet of logs on each car." Cleveland, Tr. 214, testified:

"Rule 50 as applied to the application of the rates quoted in cents per thousand feet, board measure, under the tariff required the full and actual number of feet board measure to be used in computing freight rates. Rule 50 does not provide a different measure for the freight rate where the shipper scales the logs instead of a railroad scaler."

The bureau scale does not give the *actual* number of board feet. It rejects entirely 1,627,890 feet of

wood logs. Giving effect to all the items in the tariff, it means that freight charges should be reckoned on the *actual* number of board feet transported without deductions for defects, especially wood logs and crooked timber.

(3) **If otherwise doubtful, the practical construction placed by the shippers, including appellee, and the railroad company for a generation past, is conclusive of its meaning.** (Brief 146.)

*Berwind-White Coal Min. Co. v. Chicago & E. R. Co.*, 235 U. S. 371, 59 L. Ed. 275; *Adams v. Mills, Director General*, 286 U. S. 397, 76 L. Ed. 1184; *Minneapolis etc. R. Co. v. Van Dusen*, 272 F. 255. The Commission has repeatedly so held. See 152 I. C. C. 389 and cases cited in the brief at page 151.

The evidence is undisputed that since 1906 appellant has used the scaling rule quoted at page 2 of this brief. Appellee's witness and officer, Irving, has been shipping and paying freight on logs so scaled during the entire period and with full knowledge. See Tr. 282, where he states that "I have accused the Northern Pacific of cheating me for twenty years." And again, "I began to be overcharged by the Northern Pacific when the legal department took charge of it about 1924 * * * We had to pay the bills but hollered like a white steer all the time." He admits that he took no legal action prior to 1927. His claim that the Great Northern and Milwaukee used the bureau method, even if material, relates to a period long before joint tariff 51 was promulgated. His and Frost's testimony as to the practice of other railroads, cannot be accepted because it is admitted that Mr. Frost, him-

self, and other shippers brought *identical suits against both the Great Northern and Milwaukee under Tariff* 51, (Tr. 263). Appellee's President, Jamison, admits knowledge of the scaling rule by the correspondence Ex. A-18 and Ex. A-19, Tr. 156-158. He claims only the difference between the bureau scale *plus deductions* and the railroad scale, "and 50% scale on cull logs." "We wish," says Mr. Jamison, "to be fair and reasonable in this matter and *are not asking the railroad to haul something for nothing*," (Tr. 159). The claim was settled on the basis of bureau scale plus *all deductions* and *plus full scale on the culls.* (Mitchell, Tr. 157). That is, *by appellant's scaling rule.*

The evidence was undisputed that log shippers, including appellee, had shipped millions of cars of logs and paid tens of millions of dollars in freight charges over a generation *with full knowledge that appellant never did make deductions for defects affecting merchantability*, and, especially, *never carried cull logs free of charge.* The scaling bureau was an instrumentality of the loggers not even in existence prior to *1913.* The method of scaling between buyer and seller is within their control. By increasing allowance for defects and changing definition of culls, *buyer and seller can fix the charge.* The seller could protect himself by increasing the price of what was left. Evidence was offered that this is exactly what they did under the N. R. A., by providing that a log which did not contain 50% of good lumber would be a cull in-

stead of 33% under the rule in effect in 1926. So with the defects for which deductions would be made and the amount thereof. *By the rule followed in this case appellant's freight charges are taken from its control and placed under the absolute control of the shippers.* The price of logs could be adjusted to any method of scaling buyer and seller might adopt.

(4) **Assuming Tariff 51 ambiguous, undisputed evidence that appellee's interpretation makes tariff illegal, requires rejection of that interpretation.** (See brief 159-172.)

The leading case is *Great Northern Ry. Co. v. Delmar Co.*, 283 U. S. 686. The rule has been followed in many other cases cited on page 165 of our opening brief. Appellee's interpretation results in illegality in three respects: (a) confiscation; (b) discrimination; and (c) free carriage.

(a) *Appellee's interpretation of the tariff renders it confiscatory.*

A cost study of log transportation under Tariff 51 and of the particular movement in question was offered and rejected (Assignment 25); also a comparison of car mile earnings of saw logs with other lowest rated commodities (Assignment 38). This evidence proves that use of the bureau scale deprives appellant of a just return for its service. See brief page 166.

Appellee presents two answers in addition to the usual argument that the Supreme Court decision is conclusive:

(1) This is not a rate making proceeding; and,

(2) The tariff is joint and confiscation was not shown as to all the carriers.

(1) While this is not a rate making proceeding the evidence is admissible as an *aid to interpretation* of an alleged ambiguous tariff; and,

(2) The effect on some other carrier is irrelevant. *Minnesota Rate Cases*, 230 U. S. 352; *Aetna v. Hyde*, 275 U. S. 440.

(b) *Appellee's interpretation of tariff renders it discriminatory.* Brief 168.

The tariff is applicable to all parts of Western Washington, but the commercial rule in the Grays Harbor and Columbia River areas differs from the rule used in the Puget Sound area. The tariff must mean the same in the entire area to which it is applicable; otherwise, it is discriminatory and unlawful under Rem. Rev. Stat. Sec. 10357.

(c) *Appellee's interpretation of tariff requires free carriage, contrary to Sec.* 10354 *and the* 14*th Amendment.* Brief 170.

We have shown that by the bureau scale appellant is allowed no freight on wood logs, to say nothing of the defective material. *Appellee, itself, loaded this material and tendered it for transportation.* Appellant was obliged to render the service. Where timber happens to be defective the carrier might collect only for the 6000 ft. minimum while carrying twice that amount. It may receive only *half as much* for some cars as for others, though the *transportation service is identical.*

(5) **Appellee has waived or is estopped to make claim for reparation.** (See brief p. 172.)

Appellee and the other log shippers, with full knowledge, have acquiesced in the application of appellant's scaling rule for a generation. They have shipped millions of cars of logs and paid tens of millions of dollars in freight charges computed by appellant's rule. They did not claim that identical tariffs contemplated the commercial scale, nor that appellant's tariffs were unlawful because the scaling rule was not published therein. The Department of Public Works never took that position. Appellee, in the instant case, paid freight charges during 1926 without objection. It was its duty to make prompt objection so that appellant could correct the informality in the tariff, if it was informal. Instead, appellee remained silent until its pretended claims had accrued when it was too late for appellant to protect itself by publishing the rule. Thus it caught appellant in a concealed trap. The undisputed evidence proves equitable estoppel or waiver. To hold otherwise is to permit unmerited enrichment of appellee and injustice to appellant by depriving it of the admittedly reasonable charges collected. See *Atlantic Coast Line v. Florida*, 79 L. Ed. 719. This is a clear case of deliberate entrapment.

(6) **Appellee cannot recover even under the Department's construction of the tariff because it paid only a reasonable charge and therefore was not damaged.** (See brief 181 et seq.)

*Atlantic Coast Line R. Co. v. Florida*, 79 L. Ed. 719 is directly in point. There the Supreme Court

holds that restitution of charges in excess of the lawfully published rate will not be awarded where the charges collected were just and reasonable and the carrier is excusable for not making effective in tariff form the reasonable charge to which it is entitled. This decision is made over the objection that it *denies effect to state statutes in violation of the federal constitution.* (See Justice Roberts' dissent.) This is the first case so holding under Sec. 6, although forshadowed by such cases as *Davis v. Portland Seed Co.*, 264 U. S. 403, holding that proof of damage is necessary to recovery for violation of the 4th section; *Arizona Grocery Co. v. A. T. & S. F.*, 284 U. S. 370, denying reparation for unreasonable charges collected under a tariff prescribed by the Commission; *Great Northern v. Delmar*, 238 U. S. 686, reversing a long line of commission decisions awarding reparation in the so-called alternate and circuitous route cases; and *Great Northern v. Sullivan*, 79 L. Ed. 507, decided March 4, 1935, denying reparation for an unreasonable proportional rate *in plain violation of Section 1*, because the *combination* rate paid was not excessive, and, therefore, *the shipper had not been damaged.* Then follows the Florida case. The tendency of the Supreme Court to deny reparation for violation by an interstate carrier of the interstate and *state* acts is increasingly manifest since enactment of Transportation Act, 1920, by which the United States assumes almost full responsibility for the interstate transportation system. The Interstate Commerce

Commission has, for many years, frowned on claims for reparation without damage, repeatedly recommending to Congress amendments to that effect; hardly concealing its opinion that such claims had degenerated into a form of legalized racketeering which should be ended. In the 33d Annual Report to Congress, page 19, the Commission states:

"The law, might well affirmatively recognize that *private damages* do not necessarily follow a *violation of the act*, and provide that sections 8, 9 and 16 of the act shall be construed to mean that no person is entitled to reparation except to the extent that he shows that he has suffered damage."

The Supreme Court has, by construction of the act, now made this amendment unnecessary.

Appellee seeks to distinguish the Florida case on the ground that it was in equity, whereas this case is at law. But the court holds that the rule applies "*though the action to which it is an incident were triable in a court of law.*" The case at bar was docketed on the equity side and removed to the law side on appellee's motion, on the ground that the equitable defenses are available on the law side. (See Petition Tr. 39; Order Tr. 57). If appellee erroneously caused transfer to the law side, he is not thereby entitled to a recovery which he could not obtain on the equity side. He is estopped. The equities in the case at bar are far stronger than in the Florida case. The administrative construction given to the statute as not requiring publication of the scaling rules, discussed at page 200 of our brief, and the acquiescence of the shippers, including appellee, for a generation

during which they paid freight computed under our rules without objection that they were not published, justified appellant in believing that the tariff and rule were lawful. When, for the first time, the scaling rule was challenged in this proceeding because not published, and the Department refused to give it effect for that reason, appellant immediately filed its rule, the shippers objected, it was suspended and canceled on a technicality and the order was affirmed. See *North Pacific Coast Freight Bureau v. Department*, 156 Wash. 137; Berger's test. Tr. 274; Cleveland, Tr. 233. Appellant then filed Tariff 51-B, also publishing the scaling rule, which was also attacked by the shippers, suspended and cancelled by the Department and made effective by the judgment of the District Court in *N. P. Ry. v. Baker*, 3 Fed. Supp. 1. See offer of proof, Tr. 142. Thus, it is that appellee has an award of reparation in this case, and it and other log shippers are claiming enormous sums from appellant—enough to threaten solvency—covering the period 1926 to date of decree in the Baker case, March 26, 1933, on the sole ground that the scaling rules were not published in tariff form, *the very thing the shippers did their best to prevent*, and successfully too, until defeated by the judgment of the District Court in the Baker case. Could conduct be more inequitable; could a result be more unjust? We submit that appellee's case is no better founded in point of morals than in law.

Appellee's only claim of equity is that some other carriers use the commercial rule; that it is discrim-

inated against. This it says in face of admitted fact that *other shippers have identical claims against those other carriers.* Tr. 262. However, appellant is not chargeable with discrimination for what is done by other carriers. See *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, directly in point.

(7) **Appellant's scaling rules are binding even though unpublished.** (Brief 192.)

Rules governing ascertainment of quantity, etc., need not be published. Weighing rules need not under Sec. 6 of the Commerce Act adopted as Sec. 10350.

*Becker v. N. P. Ry. Co.*, 93 I. C. C. 368; *Gentile Co. v. Tidewater So. R. Co.*, 140 I. C. C. 621. In *P. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, a carrier was held liable for disregarding its unpublished car service rule. See *especially Detroit etc. R. Co. v. I. C. C.*, 167 U. S. 633.

*Scaling rules need not be published under the administrative construction of the statute.* (Brief page 200).

For over a generation log tariffs have been accepted by the Department without scaling rules. The Department, itself, has prescribed tariffs in log rate cases without scaling rules. (Exhibit A-26, Tr. 206). Most of this evidence was rejected. (Assignments 34, 26). Construction of a statute by a tribunal charged with its administration, where long continued, is most persuasive. *North Pacific Coast Freight Bureau v. Department*, 156 Wash. 137, holds that if a tariff be in improper form, "it was not only within

the power of the department, but it was its *duty* as well, to dismiss the proceeding and cancel or order cancelled the tariff." Therefore, by accepting the tariff without scaling rules the Department approved its form.

The belated construction of Sec. 10350 convicts the Department of gross negligence and appellant of violating the law millions of times. It is therefore inadmissible. The administrative construction is conclusive. *Central R. Co. of New Jersey v. Martin*, 175 Atl. 637, and cases cited.

*Brinkerhoff v. Hill*, 281 U. S. 673, holds that reversal, with retroactive effect, of an interpretation of a statute under analogous circumstances denies due process.

(8) **The settlement of September 24, 1925, (Long-Woodworth Agreement) bars appellant's claim.** (Brief 212-243.)

Paragraph XII of the answer, (Tr. 29), pleads this defense. (The agreement is Exhibit A-25, Tr. 180). Tariff 51 was published pursuant thereto. Appellant refunded $183,841.92 to appellee and other log shippers. *The amount was calculated by our own scaling method.* It was understood that there was to be no change therein in appellant's scaling rule.

Validity of the agreement is sustained in many cases, especially *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U. S. 353. Compare *N. P. R. Co. v. St. Paul & Tacoma Lumber Co.*, 4 Fed. (2) 359, (9 C. C. A.).

The cases hold that such an agreement is binding until set aside in a direct proceeding. This case is

not such a proceeding. On the contrary, *appellee relied on the Long-Woodworth agreement before the Department*, while now saying it is invalid. See Finding 14, Tr. 82-83. The court struck this defense. See Assignment 40.

**POINT II** — (1) **The Department's findings are not admissible and do not make a prima facie case.** (Brief 243.)

If this contention be rejected, then,

(2) **The Department's findings are inadmissible because arguments, deductions, statements of law and statements of fact are inextricably commingled therein.**

If this contention be rejected, then,

(3) **It was the duty of the court to separate the findings of fact from statements of contentions, arguments, law, etc., and admit only the findings of fact.**

*Western New York & P. R. Co. v. Penn Refining Co.*, 137 Fed. 343, (3 C. C. A.), affirmed; *Lehigh Valley R. Co. v. Meeker*, 211 Fed. 785, (3 C. C. A.); *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 434; *Great Northern R. Co. v Department*, 161 Wash. 29, 296 Pac. 142.

Many statements in Exhibit 1 (Tr. 75-93), are not findings of *fact*. The 7th amendment, guaranteeing a jury trial, requires the court to exclude all but the findings of *fact*. Assignments 4 to 22 present this point. Assignments 61 to 84, inclusive, and 94, 95, 99, 100-105, inclusive, are to refusal to give specific instructions excluding the improper matter.

The court's instruction was inadequate under the cited cases (Assignment 54). The improper portions

of the findings were effectively used by appellee in the jury argument. (Tr. 296-297, 302.)

**POINT III — Admission of evidence of scaling practice of Great Northern and Milwaukee was error.** (Brief 299 et seq.)

Testimony was admitted over the objection that Milwaukee Railroad, between 1913 and 1922, accepted a shipper's scale which deducted for defects, and that the Great Northern did likewise from 1920 to 1926, inclusive, (Assignments 41, 43, 45). The Milwaukee's practice between 1913 and 1922 was too remote. Besides, it was not then operating under Tariff 51. There is no requirement of law that all railroads have the same rates, rules and regulations. The lawfulness of rates and rules depends on the circumstances of the *railroad which uses them.* A rate or rule may be valid as to some railroads and invalid as to others, depending upon the facts peculiar to each. Prior to Tariff 51, each railroad had its own tariff and published its own rates (essentially different), and had its own scaling practice. The evidence shows, for instance, that Great Northern's rates were higher than appellant's. See appellee's witness, Berger, Tr. 276. See *Minnesota Rate Cases*, 230 U. S. 352; *Aetna v. Hyde*, 275 U. S. 440 to the point that identical rates and rules may be reasonable as applied to one carrier and unreasonable as applied to another, depending upon the circumstances of each. And to the point that one carrier cannot be charged with violation of law because of what is done by another carrier, see *Central R. Co. of New Jersey v. U. S.*, 257

U. S. 247. Appellant did not offer evidence as to the practice of other carriers. If it had, this case would have been prolonged indefinitely. *A complete answer is that it is admitted that shippers on the Great Northern and Milwaukee have brought against those carriers identical claims.* Appellee's witness, Frost, states: "We filed a suit against the Great Northern. It was partially based on the proposition that *its scale was in excess of the commercial scale.*" (Tr. 263). This certainly proves that at, or very shortly after, the time that Tariff 51 took effect, the Great Northern *discontinued* using the commercial scale, even if it ever had used it. This seemed then, and does now, a sufficient answer on the issue of fact. This inadmissible testimony was effectively used in appellee's argument to the jury. (Tr. 290, 303; Assignments 50, 52).

**POINT IV — Instructions.** (See Brief 309-347.)

(1) **Effect of Findings.** (Brief 311.)

The trial court, in substance, instructed that the findings of the Department were to be *weighed as evidence* instead of instructing that they merely *shift the burden of going forward with the evidence.*

*Jones on Evidence*, Sec. 8e (7); *Tift v. Southern Ry. Co.*, 138 Fed. 753, 148 Fed. 1021, 206 U. S. 428; and cases cited appellant's brief 314.

Requested instructions in accordance with the rule announced by the cited cases were submitted and refused. (Assignments 79, 80, 94, 95, 99, 100-105, 114).

(2) **Effect of Proceedings in state courts.** (Brief 320.)

Although the decision of the Supreme Court on review was not admitted, the court refused to instruct, as requested, that the effect of the findings and order were not enhanced thereby. (Assignments 80-85). The prejudice of this error was emphasized by argument of appellee to the jury, (Tr. 296, 298, 302), *that its contentions had been sustained by the Supreme Court.* (Assignments 49, 51).

(3) **Rules for Interpretation of Tariffs.** (Brief 331.)

Assignment 55 presents the error of the peremptory instruction that board measure is ambiguous, and Assignment 56 the error of the peremptory instruction that the commercial method of scaling should have been used. Assignments 87-94 complain of the refusal of the court to instruct on the various rules for interpretation of tariffs.

**POINT V — The Court Erred in Striking the Counterclaim and Plea of Estoppel, (Paragraph XII of Answer), and in Rejecting All Evidence in Support Thereof.** (See brief, 347-348.)

**POINT VI — Free Carriage Is Illegal.** (See Brief, 348-349.)

Limitations of space do not permit argument of these points additional to the references hereinabove.

**POINT VII — Error to Admit Conclusion of Witness As to Evidence Before Department.** (See Brief, 349-352.)

The court permitted Mr. Irving to testify that the same evidence was before the Department as was before the jury. (Tr. 281-282, Assignment 48). Evidence before the Department was not admissible under any circumstances.

The importance of this assignment is in the fact that the findings of the Department were before the jury, and the answer to this question advised the jury that *on the same evidence* the Department( and the Supreme Court) ruled favorably to appellee. This error was emphasized by appellee's argument to the jury that the Supreme Court on the *merits* affirmed the Department. (Assignments 49, 51). The answer was a mere conclusion and most prejudicial, especially as used in argument.

**POINT VIII — The Court Erred in Denying Defendant's Motion to Dismiss for Want of Jurisdiction Because the Order Lacks Finality.** (See Brief, 352-376.)

*Belcher v. Tacoma Eastern R. Co.*, 99 Wash. 34, 45, holds that the reparation order must be final, fixing the amount due, else, " * * * the Superior Court did not have jurisdiction in the first instance * * * "

The jurisdiction of this court is derivative and if the state court had no jurisdiction this court has none. We deny that appellant recognized the order as final. But even so, jurisdiction cannot be given by waiver. See *C. M. St. P. & P. R. Co. v. Adams Co.*, 72 Fed. (2) 816, C. C. A. 9th C. There was a similar review in the state court of an interlocutory order in the *Campbell River Mills* case, *supra*, but before filing suit on the award plaintiff obtained a final order.

**POINT IX — The court erred in denying defendant's motion to dismiss for want of jurisdiction because the Department was disqualified under the due process clause of the 14th amendment, as alleged in Paragraph XIV of the answer.** (Brief 373-392.)

This assignment, (No. 2), is supported by *Tumey v. Ohio*, 273 U. S. 510, holding that a tribunal having

a substantial pecuniary *official* interest in the decision adverse to a party is disqualified. Appellee relies on *Dugan v. Ohio*, 277 U. S. 61. The Dugan case approves the Tumey case, but distinguishes it on the ground that the Mayor, as *Mayor*, had only *judicial* duties; and, as one of five members of the city commission, his relation to the *executive* and *financial* policy of the city was remote. But the members of the Department are in complete charge of all its activities and solely responsible for financial results of its operations.

The Department's order, on review, carried a presumption of correctness. Under this presumption the Supreme Court said it could not hold that the Department had acted arbitrarily or capriciously. It exercised no independent judgment of its own. Compare *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287. We insist there is a denial of due process. We protest with all possible emphasis against the use of the findings and order to appellant's prejudice. Especially do we protest against appellee's assertion that the order is final and conclusive.

**POINT X — The court erred in denying defendant's motion for dismissal; or, in the alternative, in refusing to sustain defendant's oral demurrer; or, in the alternative, in refusing to grant defendant's motion for a stay of proceedings, which motions and demurrer were based upon the fact that there has been a splitting of a single cause of action by plaintiff and that there is an absence of an indispensable party plaintiff.** (Brief 392-406.)

This is Assignment 3. It is not necessary to decide this point if the court holds that the order is void because of the pecuniary official interest of the

Department, or because the order is not final, as above argued. An action to recover the award is, we believe, maintainable by the Department as well under Sec. 10450, providing that the Department has the duty to enforce the law, as because of its pecuniary official interest. Appellee argues that it is the only party in interest. Even if the Department has only an official pecuniary interest it has a legal interest in the discharge of its duties analogous to that of the county treasurers in a tax case, who were held to be necessary parties in *C. M. St. P. R. Co. v. Adams County*, 72 Fed. (2) 816, by this court. How the merits of the Department's claim may be decided is beside the question. If it has capacity to sue, it is entitled to be heard. We feel under a duty to say to this court that, since the argument, the State of Washington ex rel. Department has brought an "ancillary" suit in the district court at Seattle, in which appellant and appellee are defendants, for a decree that the money be paid to it for disbursement under said Sec. 10436. As the suit is ancillary and effects the subject matter of the case at bar, it seems this court would take judicial notice of the filing of the suit in the district court. *Hennessy v. Tacoma Smelting & R. Co.*, 129 Fed. 40 (C. C. A. 9).

We respectfully submit that the judgment should be reversed and the case dismissed.

Respectfully submitted,

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